

PARTNERSHIP AGREEMENT

**between the
Alaska Division of Governmental Coordination
and the
U.S. Army Corps of Engineers,
Alaska District**

May 1997

SIGNATURE PAGE

THIS PARTNERSHIP AGREEMENT IS ENTERED INTO BY AND BETWEEN THE UNITED STATES ARMY CORPS OF ENGINEERS AND THE STATE OF ALASKA, DULY EXECUTED BY THE PARTIES SHOWN BELOW:

STATE OF ALASKA
Office of the Governor
Office of Management and Budget
Division of Governmental Coordination

DEPARTMENT OF THE ARMY
U.S. Army Engineer District,
Alaska

Diane Mayer
Director

Peter A. Topp
Colonel, Corps of Engineers
District Engineer

Date

Date

CONCURRENCE:

John T. Shively
Commissioner, Alaska Department
of Natural Resources

Date

Frank Rue
Commissioner, Alaska Department
of Fish and Game

Date

Michele Brown
Commissioner, Alaska Department
of Environmental Conservation

Date

Partnership Agreement
Alaska Division of Governmental Coordination and U.S. Army Corps of Engineers

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PARTNERSHIP AGREEMENT

**between the
Alaska Division of Governmental Coordination
and the
U.S. Army Corps of Engineers, Alaska District**

CHAPTER ONE: INTRODUCTION

I. Purpose

This Partnership Agreement (PA) serves to improve cooperation, coordination and communication between the Alaska Division of Governmental Coordination (DGC) and the U.S. Army Corps of Engineers (Corps). This PA describes the process both agencies agree to follow in making and reviewing consistency determinations for federal activities and in reviewing federal permitting actions that affect Alaska's coastal zone. The PA also identifies Corps activities not requiring a consistency determination because those activities either have no significant effect on coastal resources and, therefore, are not subject to the Alaska Coastal Management Program (ACMP), or are activities previously identified as being consistent with state and local coastal management programs (See Chapter Two: Federal Activities, § II B).

II. Authority

The authority to enter into this agreement is based on Section 307 of the Coastal Zone Management Act (CZMA) of 1972, as amended, 16 U.S.C. § 1456; and 15 CFR §§ 930.10-930.145 (1996), the federal regulations implementing the Act.

The CZMA requires that all federally conducted or supported activities, including development projects, that affect the natural resources or uses of the coastal zone be undertaken in a manner consistent to the maximum extent practicable with approved state coastal management programs. The Act also requires that federally licensed or permitted activities affecting the coastal zone be conducted in a manner consistent with approved state coastal management programs.

Nothing in this agreement shall be construed as altering, or in any way limiting, either party's ability or responsibility to act in accordance with all applicable federal, state, and local laws and

regulations. Further, implementation of any part or all of this agreement is subject to availability of funds.

III. Termination, Alteration, and Severability

This PA expires ten years after the date of final concurrence but may be renewed by mutual agreement.

Either party may terminate the PA, provided that party gives a 60-day notice. Either party may alter the PA by giving a 30-day notice and negotiating the changes with the other party so that the changes reflect a new agreement. The components of this PA are severable so that it remains a useable document even if a part of it becomes invalid.

CHAPTER TWO: NON-REGULATORY FEDERAL ACTIVITIES

Conducted by the Engineering Division

I. Coastal Zone Management Act § 307(c)(1) and (c)(2)

Each federal activity or development project within or outside the coastal zone that affects the natural resources or uses of the coastal zone must be carried out in a manner "consistent to the maximum extent practicable" with the ACMP. See CZMA § 307(c), 16 U.S.C. § 1456(c); Appendix A, infra.

"Consistent to the maximum extent practicable" means that federal activities in or affecting the coastal zone must be consistent with state management programs to the fullest degree permitted by existing law. See CZMA § 307(c), 16 U.S.C. § 1456(c); 15 C.F.R. § 930.32 (1996). Based on the CZMA and implementing regulations, there are only three situations where a federal activity may deviate from full consistency with the a state's approved coastal management program:

1. if existing federal law prohibits an agency from full compliance per 15 CFR § 930.32(a) (1996);
2. when circumstances arise after the approval of a state coastal management program which were unforeseen at the time of program approval and these circumstances present a "substantial obstacle" preventing "complete adherence" by the agency, per 15 CFR § 930.32(b) (1996); or
3. through a presidential exemption authorized by CZMA § 307(c)(1)(B), 16 U.S.C. § 1456(c)(1)(B).

II. Applicable Corps Activities

A. Activities Subject to this Partnership Agreement

This agreement applies to Corps activities and development projects as defined by 15 CFR §930.31(a)-(b) (1996). The term "activity," used throughout the PA, means any function or development project as defined in 15 CFR § 930.31 (a)-(b) (1996).

This agreement also applies to the following actions:

1. Civil works projects and environmental clean-ups other than those conducted under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq.
2. Quarry Site Evaluations, and

3. Activities performed by the Corps for other federal agencies.

B. Corps Activities Not Requiring an ACMP Consistency Review

The Corps and the State of Alaska agree that the activities listed below either have no significant effect on coastal uses or resources or have previously been found consistent with state and local coastal management programs and do not need further state coordinated review for ACMP consistency. Unless exempted by federal law, the Corps must still acquire applicable state and local authorizations for each activity. Activities that do not require a review for consistency with the ACMP include:

1. Corps activities allowed by a general permit under 33 C.F.R. §§ 322.2(f) or 323.2(h) (1995) or a nationwide permit under 33 C.F.R. § 330.1 (1995), if the state has already found the permit to be consistent with the ACMP.
2. Corps activities that are listed in the Classification of State Agency Approvals (the “ABC List”), as provided for in 6 Alaska Administrative Code (AAC) 50.050 (e), if DGC, upon receiving project information, determines that
 - a. all permits required for the project appear on the list of categorically approved permits (“A List”), as provided for in 6 AAC 50.050 (b); or
 - b. all permits required for the project appear under an activity included in the list of general concurrences (“B list”), as provided for in 6 AAC 50.050 (c), conform with the conditions of the applicable general concurrence, and require either no additional permits or only permits that appear on the “A List.”

If DGC determines the project qualifies as an A or B List activity, the Corps may go directly to the state and local government agencies to obtain the necessary authorizations.
3. Routine operation and maintenance actions on Corps projects that were in place prior to enactment of the ACMP or which were found consistent with the ACMP if constructed after enactment of the ACMP. These may include repair, renovation, rehabilitation, or replacement of existing structures and facilities with the same footprint and similar design as the original structure. These actions only apply to lands owned or occupied by the Corps for its own use. For example, the Corps owns land in Dillingham and occupies offices at Elmendorf Air Force Base.

4. Disposal of existing asbestos-free buildings¹ and improvements in developed areas for off-site removal to (a) disposal areas approved by the Alaska Department of Environmental Conservation (DEC); (b) licensed recycling centers; (c) Corps-approved vendors; or (d) a site outside Alaska. Disposal may include removal of underground storage tanks.²
5. Use of an existing quarry site as identified in the Letter of Agreement for quarry site evaluation between the Division of Governmental Coordination and the U.S. Army Corps of Engineers, Alaska District, dated June 25, 1990 (See Appendix B).³

III. Corps Consistency Determination Procedure

The National Environmental Policy Act (NEPA) process is the backbone of the Alaska District's environmental compliance process for construction. The environmental assessment (EA) or environmental impact statement (EIS) prepared during the NEPA

¹ Disposal of buildings containing asbestos must comply with applicable Alaska Department of Environmental Conservation regulations.

² This exception applies to non-leaking underground storage tanks and does not include soil remediation. When removing a non-leaking underground storage tank, the Corps agrees to notify the Alaska Department of Environmental Conservation (DEC).

³ According to the Letter of Agreement, no ACMP consistency review is required if 1) a contractor purchases the rock necessary for a project from an operating commercial quarry site; or 2) the quarry site from which the contractor proposes to obtain the necessary rock is located out of state, outside of the coastal zone, or does not directly affect the coastal zone. In addition, DGC will require not more than 15 days to review and comment on the selection and operation if a contractor proposes to use, without modifications, a quarry site, which has previously been found consistent with the ACMP.

process is used to develop issues, provide information, and document coordination and compliance requirements for most projects in Alaska.

The NEPA process can be used to ensure that coastal issues are identified and that coastal resources are considered in the NEPA decision. To do so, the process must also accommodate any requirements specific to the CZMA program, and provide information needed for the coastal consistency review. The NEPA document also usually contains the District's consistency determination regarding the status of the proposed action in relation to the ACMP and applicable coastal district management plans. In the NEPA document, the District may provide a consistency determination (supported by a specific reference to state standards and enforceable policies), a formal negative determination [for actions listed in 15 CFR 930.35 (d)], or an informal statement that the action is outside, and/or will not cause an effect on resources or uses of the coastal zone.

The Corps agrees to use the following procedure for making a consistency determination for activities conducted by or on behalf of the Corps.

A. Determining if an Activity Affects the Coastal Zone

The Corps agrees to review each of its activities to determine whether they may affect any land or water use or natural resource of Alaska's coastal zone. The Corps agrees to use the following to help determine if an activity affects the coastal zone.⁴

1. Guidance in CZMA § 307(c)(1)(A), 16 U.S.C. § 1456(c)(1)(A) and 15 C.F.R. § 930.33(b)-(c) (1996).
2. Consideration of other applicable factors, including but not limited to whether:
 - a. the action causes a change in the manner in which land, water or other coastal zone natural resources are used;
 - b. the action causes a limitation on the range of uses of coastal zone natural resources;

⁴ Comment to 15 CFR § 930.33 encourages federal agencies to "construe liberally" an effect in borderline cases "so as to favor inclusion of Federal Activities subject to consistency review."

- c. the action causes changes in the quality or quantity of coastal zone natural resources; or
 - d. the action is a subject use as described in 6 AAC 85.070 and identified in an applicable coastal district program.
- 3. Consideration of cumulative and secondary effects. In its 1990 report reauthorizing the CZMA, Congress stated its intent that cumulative and secondary effects be considered when a federal agency makes a determination on whether a specific federal agency activity affects any natural resource, land use, or water use in the coastal zone.⁵

Accordingly, the Corps agrees to consider reasonably foreseeable direct and cumulative effects which the activity causes or contributes to, and indirect effects which the activity may cause or contribute to and are later in time or farther removed in distance but still reasonably foreseeable.

- 4. Negative Determinations
 - a. Pursuant to 15 CFR § 930.35(d) (1996), the Corps agrees to provide a negative determination to DGC if the Corps determines an activity listed in 15 CFR § 930.35(d) does not affect the natural resources or uses of the coastal zone and does not require a consistency determination. Pursuant to 15 CFR § 930.35(d) (1996), the Corps agrees to provide a brief description of the project and the reasons a consistency determination is not required, at least 90 days before final approval of the activity unless the Corps and DGC agree to an alternative notification schedule.⁶ The Corps will generally prepare a negative determination only for actions listed in 15 CFR § 930.35(d), but may elect to do so for borderline cases after consultation with DGC.
 - b. Upon receipt of a negative determination, DGC will distribute a copy of the determination and any supporting information to

⁵ See H.R. CONF. REP. NO. 964, 101st Cong., 2nd Sess. 970 (1990), reprinted in 1990 U.S.C.C.A.N. 2374, 2675 (reproduced here at Appendix D). While legislative history is not legally binding, it is persuasive evidence of Congressional intent.

⁶ DGC and the Corps may agree that a project is sufficiently major or minor as to merit a longer or shorter notification schedule.

reviewers for a 30-day review⁷ by state agencies and affected coastal districts. The purpose of this review is to determine whether the state agrees with the negative determination.

- c. In those instances where the state concurs with the negative determination prior to the 90-day response period allowed in 15 C.F.R. § 930.35(d), the project may proceed after required state and local authorizations, if any, are obtained.
- d. In the event the state does not agree with a Corps negative determination and the disagreement cannot be resolved through informal negotiations, 15 CFR § 930.36 (1996) authorizes the Corps and the state to follow the mediation procedures described in Subpart G of the federal consistency regulations (15 CFR §§ 930.110 - 930.116 (1996)), or either party may seek judicial review.

B. Determining if an Activity is Consistent with the Enforceable Policies of the ACMP

If an activity affects the coastal zone, the Corps agrees to determine whether the activity is consistent to the maximum extent practicable with the enforceable policies of the ACMP. The Corps agrees to use the following to help determine if an activity is consistent with the ACMP.

- 1. ACMP standards identified in Title 6, Alaska Administrative Code, Chapter 80, as amended. The state “Guide to Preparing an ACMP Consistency Determination for Federal Activities” is recommended for use to evaluate the planned activity's consistency with state coastal standards.

⁷ The review is not a consistency review and no public notice is required.

2. Approved district coastal management program⁸ enforceable policies and definitions.
3. Information made available through the National Environmental Policy Act (NEPA) process, such as in an environmental impact statement or environmental analysis.

Before making a consistency determination, the Corps will analyze secondary and cumulative impacts by:

1. coordinating with federal, state, regional, and local agencies, as well as certain private citizens who may be affected; and
2. examining available management plans such as for areas adjacent to or within the project area that may be affected by the proposed project.

⁸ Includes cities, boroughs, and coastal resource service areas.

C. Providing a Consistency Determination to the State⁹

1. Timing: Pursuant to 15 CFR §930.34(b) and §930.35(d) (1996), the Corps agrees to provide a consistency determination to DGC at least 90 days before the Corps' final approval of the activity, unless both the Corps and DGC agree to an alternative notification schedule. The state's review period begins upon DGC's receipt of the Corps' complete determination as described in Chapter Two, § III C 3 below. The project can proceed sooner than 90 days if the final consistency finding is issued by the state and other necessary approvals are obtained.
2. Format:
 - a. Pursuant to 15 CFR § 930.39(a) (1996), the Corps agrees that their consistency determination shall include a brief statement based on an evaluation of the relevant provisions of the ACMP of whether the proposed activity will comply with the management program "to the maximum extent practicable."
 - b. The following may also serve as the consistency determination for activities and development projects conducted or authorized by the Corps.
 - (1) A completed "Guide to Preparing an ACMP Consistency Determination for Federal Activities" or
 - (2) A separate letter; or
 - (3) A consistency determination may be provided to the state in NEPA documents.¹⁰

⁹ For projects in southeast Alaska, determinations shall be sent to the Project Review Coordinators in the Juneau DGC office. For projects in southcentral and northern Alaska, determinations shall be sent to the Anchorage DGC office.

¹⁰ Comment to 15 CFR § 930.34(a), federal agencies are "strongly encouraged to provide consistency determinations to state agencies through use of existing notification procedures," such as NEPA documents, so long as such procedures are modified to comply with 15 CFR § 930 et seq. 44 Fed. Reg. 37, 147 (1979).

3. Content: The Corps agrees to include with the consistency determination a description of the project, associated facilities and effects, and any other necessary supplemental information including design drawings, a completed Coastal Project Questionnaire (CPQ) and copies of state and federal permit applications, sufficient to support the Corps' consistency determination.

D. Issuing a Public Notice

The Corps agrees to issue a public notice advising of its proposed federal activities in or affecting the coastal zone. DGC cannot start its review until the Corps issues its public notice and DGC receives a complete consistency determination. The language noted in 1 and 2 below will address this requirement.

The Corps agrees to mail or transmit by facsimile or other means, a copy of the public notice, necessary supporting information, the consistency determination, and upon request, the distribution list to DGC. If the Corps does not intend to issue a public notice, the Corps will notify DGC so appropriate ACMP notice requirements can be met.

1. Newspaper public notices will use the following:

Notice is hereby given that a consistency determination is being provided to the Division of Governmental Coordination as provided in Section 307(c)(1) of the Coastal Zone Management Act of 1972, as amended [16 U.S.C. 1456(c)(3)], that the project described in the Corps of Engineers Public Notice No. _____, will comply with the Alaska Coastal Management Program and will be conducted in a manner consistent to the maximum extent practicable with that program.

[Brief description of project, including a statement that the Corps is the proponent agency.]

The Division of Governmental Coordination requests your comments on the proposed project's consistency with the Alaska Coastal Management Program. Your comments are required to preserve your rights to file a petition under Alaska Statute 46.40.100 asking the Coastal Policy Council to review the development of the state's consistency certification. For more information on the consistency review process, comment deadlines, and affected coastal district status, or to submit written comments, please contact the Division of Governmental Coordination, [select one: P.O. Box

110030, Juneau, AK 99811-0030, (907) 465-3562; 3601 C Street, Suite 370, Anchorage, AK 99503-5939, (907) 269-7470; or Joint Pipeline Office, 411 W. 4th Ave., Ste 2-C, Anchorage, AK 99501-2342 (907) 271-4317].

The State of Alaska, Division of Governmental Coordination, complies with Title II of the Americans with Disabilities Act of 1990. Individuals with disabilities who may need auxiliary aids, services, or special modifications to participate in this review may contact the number above.

2. Public notices by letter will use the following:

Notice is hereby given that a consistency determination is being provided to the Division of Governmental Coordination as provided in Section 307(c)(1) of the Coastal Zone Management Act of 1972, as amended [16 U.S.C. 1456(c)(3)], that the project described in the Corps of Engineers Public Notice No. _____, will comply with the Alaska Coastal Management Program and will be conducted in a manner consistent to the maximum extent practicable with that program.

The Division of Governmental Coordination requests your comments on the proposed project's consistency with the Alaska Coastal Management Program. Your comments are required to preserve your rights to file a petition under Alaska Statute 46.40.100 asking the Coastal Policy Council to review the development of the state's consistency certification. For more information on the consistency review process, comment deadlines, and affected coastal district status, or to submit written comments, please contact the Division of Governmental Coordination, [select one: P.O. Box 110030, Juneau, AK 99811-0030, (907) 465-3562, 3601 C Street, Suite 370, Anchorage, AK 99503-5939, (907) 269-7470, or Joint Pipeline Office, 411 W. 4th Ave., Ste 2-C, Anchorage, AK 99501-2342 (907) 271-4317].

E. Responding to State Agency Action

The Corps may presume DGC's concurrence if DGC fails to respond within 60 days. (See § IV. C., *infra*). The Corps agrees to not presume DGC's concurrence when DGC has requested an extension of time and will contact DGC before assuming DGC's concurrence. The Corps may not take final action sooner than 90 days from the issuance of its consistency determination unless a state consistency finding is issued and necessary permits are acquired per Chapter Two § III.C. above. See 15 CFR § 930.41 (1996).

IV. State Consistency Review Procedure

The State of Alaska agrees to use the following procedure for reviewing a consistency determination submitted to the state by the Corps:¹¹

- A. DGC agrees to coordinate the State of Alaska's review of the Corps' consistency determination under procedures contained in Title 6, Alaska Administrative Code, Chapter 50, as amended and in the manner provided in 15 CFR §§ 930.10-930.145 (1996).
- B. DGC agrees to notify the Corps of the state's agreement or disagreement with the consistency determination at the earliest practicable time, not to exceed 60 days after the start of the state's review. Due to the state's review schedule specified in 6 AAC 50.110(a), DGC automatically requests a 15-day extension to the 45-day review period.¹² Extensions past 60 days are subject to the Corps' approval. See 15 CFR § 930.41(a)-(b) (1996).
 1. Requests for Information: DGC may request additional information from the Corps if DGC, a commenting agency, or an affected coastal district determines that the information provided by the Corps is inadequate for the state to determine agreement or disagreement with the Corps' consistency determination. The request will identify the information needed and why the information is necessary to determine the consistency of the federal activity with the ACMP. See 15 CFR § 930.42(b) (1996).
 2. State Disagreement with Corps Consistency Determination: In the event the state does not agree with the Corps' consistency determination, DGC agrees to explain the reasons why the proposed activity is inconsistent with the ACMP and describe alternative measures, if any, that would allow the activity to proceed in a consistent manner.
 3. Alternative Measures: If the Corps accepts the state's alternative measures, the alternative measures will be incorporated into the project. If

¹¹ Review procedures for negative determinations are outlined in Chapter Two § III A 4.

¹² See 15 C.F.R. § 930.41(b) (1996). 6 AAC 50.110(a) directs DGC to complete its review by the end of 50 days when a public notice is required.

the Corps does not accept the state's alternative measures, DGC and the Corps agree to attempt to resolve the disagreement through the 6 AAC 50.070(j) and (k) elevation process.

4. Disagreement Resolution: In the event the disagreement cannot be resolved through the 6 AAC 50 process, the state and the Corps may follow the mediation procedures described in Subpart G of the federal consistency regulations (15 CFR §§ 930.110 - 930.116 (1996)), or seek judicial review.

C. Modifications.

If the Corps or contractors wish to modify a proposed or existing project in any way, the Corps must determine whether the modification may affect coastal resources or uses and whether a consistency determination must be provided to the state. The Corps agrees to interact with DGC as described below when determining if further consistency review is needed.

The state must have adequate information to evaluate the likely effects of the modification on coastal resources and uses and the need for further consistency review. The Corps or the contractor should provide (1) the previous state review ID number; (2) a brief but complete description of the proposed modification; and (3) an identification of any additional permits that will be required.

1. Minor Modifications:

- a. The Corps agrees to determine a modification to be minor only
 - i. for modifications to projects that have already been authorized and found consistent with the ACMP; and
 - ii. if the Corps determines the modification will not significantly affect coastal resources or uses and does not require other state or federal authorizations which are subject to ACMP review; or
 - iii. the modification qualifies for a categorically approved permit on the A List or general concurrence activity on the B List as described in Chapter Two, § II B.
- b. For minor modifications, the Corps agrees to send the information described in Chapter Two § IV C (Modifications) above to DGC, the affected coastal district(s), and the appropriate offices of the Departments of Environmental Conservation, Fish and Game, and Natural Resources. The state agencies will determine whether the modification requires consistency review or if additional permits

or public notice are required before the Corps proceeds with the modification.

- c. DGC will consult with appropriate state agencies and coastal districts and will determine whether the state agrees that the effects of the modification are not significant enough to warrant further review.

Within ten days, DGC will notify the Corps that the state either agrees or disagrees that the modification is minor. If the state agrees, the Corps may proceed with the activity. If the state disagrees, DGC will provide the Corps with its reasons for disagreement and request a consistency determination from the Corps per 15 CFR §§ 930.33 and 930.34 (1996) and Chapter Two § III, Corps Consistency Determination Procedure.

2. Modifications Subject to Review: If the Corps determines a proposed modification will affect coastal resources or uses to a greater extent or in a manner different from the initial consistency determination, the Corps must submit a consistency determination to DGC for review. DGC agrees to start the review as soon as the Corps provides its consistency determination as outlined in Chapter Two § III. C, Corps Consistency Determination Procedure. DGC understands the need for rapid response when modifications are necessary during construction.

V. Coordinating a Consistency Determination with the Corps' National Environmental Policy Act (NEPA) Process

Recognizing that it is difficult for the Corps to respond to state and local coastal district consistency concerns after issuance of a final NEPA document, the Corps agrees to use the following procedure to coordinate CZMA requirements and NEPA requirements.

- A. The Corps agrees to notify DGC of all opportunities to comment on proposed development projects during the project development phase of the Corps' NEPA review. DGC agrees to inform state review participants and other interested parties of the opportunities to comment on the proposed action. The Corps agrees to contact responsible resource and regulatory agencies to identify scoping issues, areas of responsibility, and permit requirements. To encourage early substantive participation, the Corps may ask DGC to identify responsible agencies and to coordinate an informal NEPA scoping review to obtain early input on possible consistency issues. State agencies and local coastal districts will participate to the degree other priorities allow.

- B. Following its NEPA procedures, the Corps agrees to prepare a NEPA document (i.e., an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) or draft and final Environmental Impact Statement (EIS)) for public comment. DGC agrees to coordinate the review by the state, including potentially affected coastal districts, of the draft to the extent adequate information is presented and agency priorities allow.¹³
- C. The Corps has the following options for providing a consistency determination to DGC.
 - 1. After the close of the NEPA public comment period, but before issuance of the final NEPA document, the Corps may submit a consistency determination based on its preferred alternative to DGC for state consistency review. DGC agrees to coordinate the state review of the consistency determination pursuant to the process and timelines specified in this agreement. If the state agrees with the Corps consistency determination, the Corps agrees to issue a final NEPA document provided that the document only includes all changes required from conditions in the state's consistency finding. Any and all modifications to the project in the final NEPA document that were not previously reviewed for consistency or that do not fully conform to the conditions in the state consistency finding shall be provided to DGC and commenting state agencies to determine if further review is necessary; or
 - 2. The Corps may provide its consistency determination to DGC as a part of its final NEPA document [i.e., the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) or Environmental Impact Statement (EIS)], including the Record of Decision (ROD); or
 - 3. Any other options that are mutually acceptable.

VI. Letter of Agreement for a Quarry Site Evaluation

¹³ The purpose of DGC's review is to participate in the NEPA process and to identify preliminary ACMP issues.

On June 25, 1990, the Corps and DGC signed a Letter of Agreement (LOA)¹⁴ that provides guidance and establishes procedures for ensuring the consistency with the ACMP of quarry sites for Civil Works Projects administered by the Corps that are located within or affect the state's coastal zone. This LOA remains in effect and both agencies agree to follow the procedures contained therein.

¹⁴ The LOA is reprinted in Appendix D.

CHAPTER THREE: PERMITTING ACTIONS

Conducted by the Regulatory Branch

I. Coastal Zone Management Act § 307(c)(3)

An applicant for a federal license or permit required to conduct an activity affecting the natural resources or uses of the coastal zone must provide a certification that the proposed activity complies with and will be conducted in a manner consistent with the ACMP. See CZMA § 307(c), 16 U.S.C. § 1456(c). The statute then requires DGC to establish procedures for public notice and, where the state deems them necessary, to establish procedures for public hearings, and finally to notify the Corps that the state concurs with or objects to the applicant's certification. Once the state has actually or presumably concurred with the consistency certification, or the Secretary of Commerce has found the activity consistent with CZMA objectives or otherwise necessary in the interest of national security¹⁵, the Corps may grant the license or permit. See Id.

II. Applicable Permits

This agreement applies to the following permits and permit modifications.

1. Permits issued pursuant to Section 10 of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. § 403, authorizing certain structures or work in or affecting navigable waters of the United States.
2. Permits issued pursuant to Section 4(f) of the Outer Continental Shelf (OCS) Lands Act, as amended, 43 U.S.C. § 1333(e), authorizing artificial islands or fixed structures on the OCS.
3. Permits issued pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, 33 U.S.C. § 1413, authorizing the transportation of dredged material by vessel or other vehicle for the purpose of dumping the material in ocean waters at designated dumping sites.¹⁶

¹⁵ Instances when the Secretary of Commerce becomes involved in the consistency determination process are extremely rare.

¹⁶ Section 103 permits for disposal of dredge spoils apply outside the territorial sea and are approved

4. Permits issued pursuant to Section 404 of the Clean Water Act (CWA), as amended, 33 U.S.C. § 1344, authorizing the discharge of dredged or fill material into waters of the United States at specific disposal sites (also subject to a state certificate of reasonable assurance, CWA § 401, 33 U.S.C. § 1341).

III. Corps Standard Permit Reviews

A. Document Distribution and Forwarding for Early Coordination

The Corps will distribute the State's CPQ to potential applicants along with their permit applications. When the Corps receives an original CPQ, the Corps agrees to send the CPQ to DGC. Similarly, when DGC receives an original Corps permit application, DGC agrees to send it to the Corps. When possible, the Corps agrees to send the CPQ or notify DGC as early as possible so that start-up review packet preparation can begin. This early action will help ensure a timely start to the State's consistency review. Once the Corps has determined the application is complete, the Corps agrees to send a complete application package and a copy of the public notice to DGC.

B. Public Notice

1. When issuing a public notice for applications for permits listed in Chapter Three § II above, the Corps agrees to include a statement outlining the applicant's responsibility to certify that the project is consistent with the ACMP.
2. Within 15 days of receipt of a complete Corps permit application from the applicant, the Corps is required by federal law to issue a public notice advising the public of the proposed activity. The Corps agrees to mail a copy of the public notice, application, necessary information, and consistency certification to DGC. Upon request, the Corps agrees to send DGC a copy of the distribution list of those that received the public notice.
3. For projects within or affecting the natural resources or uses of the coastal zone, the Corps agrees to include in its public notice a statement that in accordance with federal law, the project must be reviewed for compliance with the ACMP, and that the state is also seeking comments from the

by the Environmental Protection Agency. See 33 U.S.C. §§ 1402(b), 1413(c).

public. The following language or future amended language will address this requirement.

For newspaper public notices:

A request has been received by the Division of Governmental Coordination for a consistency determination, as provided in Section 307(c)(3) of the Coastal Zone Management Act of 1972, as amended [16 U.S.C. 1456(c)(3)].

Applicant:

Activity/Purpose:

Location:

The consistency determination is required because the applicant has applied for [identify Corp of Engineers application number and waterway]. The consistency certification is a statement of assurance that the federally permitted activity which will affect the coastal zone, will be conducted in a manner consistent with the enforceable policies and standards of the Alaska Coastal Management Program (ACMP).

The Division of Governmental Coordination requests your comments on the proposed project's consistency with the ACMP. Your comments are required to preserve your rights to file a petition under Alaska Statute 46.40.100 asking the Coastal Policy Council to review the development of a proposed consistency determination. For more information on the consistency review process, comment deadlines, and affected coastal district status, or to submit written comments, please contact the Division of Governmental Coordination, [select one: P.O. Box 110030, Juneau, AK 99811-0030, (907) 465-3562, 3601 C Street, Suite 370, Anchorage, AK 99503-5939, (907) 269-7470, or Joint Pipeline Office, 411 W. 4th Ave., Ste 2-C, Anchorage, AK 99501-2342 (907) 271-4317].

The State of Alaska, Division of Governmental Coordination, complies with Title II of the Americans with Disabilities Act of 1990. Individuals with disabilities who may need auxiliary aids,

services, or special modifications to participate in this review may contact the numbers above.¹⁷

For public notices by letter:

Notice is hereby given that a request is being filed with the Division of Governmental Coordination for a consistency determination, as provided in Section 307(c)(3) of the Coastal Zone Management Act of 1972, as amended [16 U.S.C. 1456(c)(3)], that the project described in the Corps of Engineers Public Notice No. _____, will comply with the Alaska Coastal Management Program and that the project will be conducted in a manner consistent with that program.

The Division of Governmental Coordination requests your comments on the proposed project's consistency with the Alaska Coastal Management Program. Your comments are required to preserve your rights to file a petition under Alaska Statute 46.40.100 asking the Coastal Policy Council to review the development of a proposed consistency determination. For more information on the consistency review process, comment deadlines, and affected coastal district status, or to submit written comments, please contact the Division of Governmental Coordination at [select one: P.O. Box 110030, Juneau, AK 99811-0030, (907) 465-3562, 3601 C Street, Suite 370, Anchorage, AK 99503-5939, (907) 269-7470, or Joint Pipeline Office, 411 W. 4th Ave., Ste 2-C, Anchorage, AK 99501-2342 (907) 271-4317].

C. Granting a Permit

1. Pursuant to CZMA § 307(c)(3), the Corps agrees to not issue a permit until:
 - a. DGC concurs with the applicant's certification; or

¹⁷ The public notice may also include the notice requirements of the Department of Environmental Conservation for issuing a certification of reasonable assurance under the Clean Water Act § 401.

- b. the state's concurrence is conclusively presumed by the Corps in accordance with 33 CFR § 325.2 (b)(2)(ii)¹⁸; or
 - c. the Secretary of Commerce on his own initiative or on appeal by the applicant, finds the activity is consistent with the objectives of the CZMA or is necessary in the interest of national security.
2. Provisional Permits: Under certain conditions¹⁹, the Corps may issue an applicant a provisional permit per guidance in Corps Regulatory Guidance Letter # 93-1. Before transmitting a provisional permit, the Corps agrees to contact DGC to verify the status of the state consistency review. The

¹⁸ 33 CFR § 325.2 (b)(2)(ii) provides for the Corps to presume concurrence if DGC fails to concur or object within six months of DGC's receipt of the certification statement. However, mutually agreed to language in the Coastal Project Questionnaire Certification Statement states that "This certification statement will not be complete until all required State and federal authorization requests have been submitted to the appropriate agencies." As such, if DGC receives an incomplete application, they will notify the Corps as soon as possible (normally within two weeks). The Corps and DGC will work together, when appropriate, to obtain a complete application/certification. Examples of when it may not be appropriate to work together include: property disputes involving ADNR lease applications, untimely notifications, associated operational licenses or certifications such as FAA, FERC, NASA, USCG Spill Prevention and Containment Plans, and actions/activities considered by the Corps to be too remotely associated with the Corps application. If circumstances require the state consistency review to take longer than six months, DGC will send a letter to the Corps objecting to the certification statement with the reasons for the objection.

¹⁹ See also section § VIII B, page 28, on the use of Provisional Permits during resolution of a consistency dispute.

Corps also agrees to send a copy of the provisional permit transmittal letter to DGC. During the state consistency review, DGC agrees to notify the Corps of any time extension.

IV. State Consistency Review Procedure

A. Start-up for State Consistency Review

1. The first day of the State of Alaska's consistency review begins when a public notice for the project has been issued and DGC has received the following from the applicant:
 - a. a completed CPQ, including a Coastal Project Consistency Certification;
 - b. copies of all necessary state permit applications and supporting material;
 - c. copies of all necessary federal permit applications and supporting material;
 - d. necessary data and information including but not limited to:
 - (i) a detailed description of the proposed activity and its associated facilities that is adequate to permit an assessment of the probable coastal zone effects;
 - (ii) maps, diagrams, technical data and other relevant material to supplement a written description; and
 - (iii) a brief assessment evaluating the project for consistency with the enforceable policies of the ACMP. See 15 CFR §§ 930.58 and 930.60.
- DGC will notify the Corps if any of the above items are not received.
2. The state agrees to notify the Corps of the state's review schedule and deadlines. DGC and the Corps agree to consult on a proposed activity which has a substantial environmental impact, is considered controversial, is an emergency as defined in 33 CFR § 325.2(e)(4) and discussed in 6 AAC 50.090, or raises other unusual circumstances that may warrant an altered review schedule.

3. The schedule for the state consistency review will be determined on a case-by-case basis, contingent on the need for other state permits, federal permits, or the need for a broader public notice as required under AS 46.40.096(c). Most consistency reviews require public notice which results in a 50-day review schedule.
4. Pursuant to 15 CFR §930.63(a), the state has up to six months after start-up of the state consistency review to notify the Corps whether the state concurs with or objects to the consistency certification. If the state does not object within six months, concurrence shall be presumed.

The start-up date for the Corps review process and the state consistency review process may not always coincide due to different requirements for a complete application packet. Since Corps and state review start-up times may differ, the Corps will notify DGC when it intends to conclusively presume concurrence. DGC agrees to keep the Corps informed of a project's review status and will make every effort to obtain a complete packet and initiate review start-up in a timely manner.

B. State Response

1. DGC agrees to render the State of Alaska's consistency determination according to the time frames specified in 6 AAC 50, as amended. The consistency determination may be a concurrence with a project, concurrence with stipulations²⁰, or objection to a consistency certification. DGC may lengthen its review schedule as necessary for extensions as outlined in 6 AAC 50.110.²¹
2. The state may also need to extend the review schedule for petitions. AS 46.40.096 (e)(1) and (g) and AS 46.40.100(b) allows an affected coastal resource district, a state agency, the project applicant, or a citizen of an affected coastal resource district to file a petition with the Alaska Coastal Policy Council showing that a district coastal management program is not being implemented, enforced, or complied with. AS 46.40.100(b)(1) outlines the procedure the Alaska Coastal Policy Council will follow to

²⁰ If DGC concurs the project is consistent with stipulations, this action does not obligate the Corps to carry the stipulations on their authorization.

²¹ Extension of the State review schedule by DGC does not change the federal regulatory time of six months for conclusive presumption of state concurrence. See 15 CFR 930.63(a).

determine whether DGC has fairly considered public comments in developing its proposed consistency determination.

C. Public Hearings

If DGC and the Corps decide to hold a public hearing on a proposed activity, they will hold a joint hearing when practicable. DGC and the Corps agree to share equally the common costs of a joint hearing.

V. Letters of Permission (LOP)

- A. The Corps may conduct a 15-day comment period for certain new projects that require a Section 10 permit which the Corps determines are "minor" in nature, will not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition. See 33 CFR 325.2(e)(1)(i).
- B. At present, the State of Alaska does not have the discretion to conduct anything other than 30- or 50-day reviews.²² Accordingly, DGC and the Corps agree that to ensure the consistency review begins promptly, the Corps transmittal to the state should include the information described in § IVA.(excluding the public notice), and a cover letter containing the Corps' determination. DGC agrees to conduct its consistency review pursuant to § IV.A. Pursuant to 15 CFR § 930.63(c), if the state finds the project consistent, or if consistency is presumed in accordance with 15 CFR § 930.63, the Corps may approve the letter of permission.

VI. Modifications

- A. When the Corps receives a proposal for a modification to a previously reviewed and approved project or an applicable permit (See page 17, § II.), the Corps agrees to notify DGC of its determination of the significance of the proposed modification. Except for an In-house Approval as described in Chapter Three § VI.B.3. below, the State of Alaska agrees to review a modification according to procedures in 6 AAC 50, as amended.

²² These review times may change when DGC revises the applicable regulations.

To ensure the consistency review begins promptly for a modification where the Corps is soliciting comments from state and federal agencies and affected coastal districts, the Corps' transmittal²³ to the state will include:

1. a completed CPQ, including a Coastal Project Consistency Certification;
2. other necessary supporting information (i.e. plans, narrative, etc.); and
3. a Corps cover letter containing the basis for the Corps' determination.

B. The Corps agrees to process a modification by one of the following procedures:

1. Corps Public Notice: If the Corps determines that a proposed modification is such that a public notice is warranted, the Corps agrees to issue a public notice with either a 15- or 30-day comment period.
 - a. DGC agrees to conduct a 50-day review for:
 - (i) 30-day Corps public notices; and
 - (ii) 15-day Corps public notices with an associated 30-day public notice period for a 401 certification.
 - (iii) other permits which require a 50-day review period.
 - b. DGC agrees to conduct a 30-day review for a Corps 15-day public notice if there are no state or federal permits which require a 50-day review.

²³ The information requirements for an In-house Approval in Section B. 3 are different than those noted here.

2. Corps Comment Letter: The Corps agrees to issue a 15-day comment letter to DGC and other parties pursuant to the Fish and Wildlife Coordination Act²⁴ if the Corps determines the modification to a previous authorization is not substantial enough to warrant a full public interest review. The Corps agrees that the comment letter will contain the Corps' determination. The state agrees to determine whether the modification is significant enough to warrant consistency review and if other state or federal authorizations are required which are subject to ACMP review. This determination may be based upon consultation with appropriate state agencies and coastal districts. If a consistency review is required, DGC will inform the Corps, issue a public notice, and conduct a 30-day consistency review (if a 50-day review is not needed), and notify the Corps of the consistency determination.
3. In-house Approval: The Corps can only issue an in-house approval for modifications to projects that have previously been authorized.
 - a. The Corps agrees to issue an In-house Approval only

²⁴

Notification is sent to the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and the Alaska Department of Fish and Game. See 16 U.S.C. §§ 661-666c; 33 C.F.R. § 320(e) (1996).

- i. if the Corps informally determines the effects of the modification are minor and will not affect coastal resources²⁵; and
 - ii. if the Corps notifies the applicants of their responsibility to acquire other necessary federal, state, and local government authorizations before proceeding.
- b. The Corps agrees to send a copy of an In-house Approval for modification to DGC (who will send it to the affected coastal district), and the appropriate offices of the Departments of Environmental Conservation, Fish and Game, and Natural Resources. The state will determine whether the modification needs state review or if additional State permits or public notice are required for state approvals.
- c. Upon receipt of an In-house Approval, DGC agrees to consult with appropriate state agencies and coastal districts to determine whether the state concurs that the effects of the modification are not significant enough to warrant review and if other state or federal authorizations are required which are subject to ACMP review. DGC will notify the Corps on actions where they initiate further review. DGC will also notify the Corps if additional conditions are added to the State consistency finding or the 401 water quality certification.

VII. General or Nationwide Permits

²⁵ 15 CFR § 930.51 defines “Federal license or permit.” The term includes major amendments of Federal license and permit activities not previously reviewed by the State, major amendments previously reviewed by the State which are filed after and are subject to management program amendments not in existence at the time of original State review, and major amendments previously reviewed by the State which will cause coastal zone effects substantially different than those originally reviewed by the State.

- A. When the Corps proposes issuing a general or nationwide permit (GP or NWP) for an activity which affects land or water uses or natural resources of the State of Alaska's coastal zone, the Corps agrees to issue a consistency determination.²⁶ The state will either concur, request that alternative measures (Regional Conditions) be attached to the GP or NWP, or disagree with the Corps' consistency determination. If the state requests alternative measures, mutually agreeable conditions may be incorporated to resolve concerns or objections.
1. If the state disagrees with the Corps consistency determination, the Corps may deny, without prejudice, authorization for the activities that affect the state's coastal zone. The permit is denied until the permittee:
 - a. furnishes the Corps with an individual consistency certification pursuant to CZMA §307(c)(3) and a Section 401 water quality certification or waiver; and
 - b. demonstrates that the state has concurred in the consistency certification; or
 - c. demonstrates that concurrence should be presumed based on the state's failure to act within six months after receipt of the permittee's consistency certification by the state.
 2. If the GP or NWP is found consistent, DGC agrees to place the activity covered under the permit on Section II of the General Concurrence list of the Classification of State Agency Approvals (the "ABC" list), the next time the list is revised. See 6 AAC 50.050.
- B. After consulting with state agencies and coastal districts, DGC agrees to furnish the Corps with a list, in the consistency determination, denoting the nationwide permits requiring a pre-construction notification (PCN) for which they wish to participate in the review process. The Corps and DGC agree to follow the PCN procedures contained in 33 CFR § 330 for nationwide permits requiring a PCN, as modified by any agreed upon Regional Conditions, and for which the State of Alaska has requested to participate in a PCN review. In addition, the State will notify the Corps of any additional nationwide permits where they believe a PCN

²⁶ The consistency determination may be included in the public notice as described in Chapter Three § III. B, Public Notice.

is appropriate and, if mutually agreeable, these nationwide permits will also be subject to the same PCN procedures.

- C. Generally, no Corps permit application is required from an applicant who conducts his project under the authorization of a nationwide permit. However, applicants frequently request verification from the Corps that their proposed work is authorized by a nationwide permit. In cases where the Corps verifies that an applicant's project is authorized by a nationwide permit, the Corps agrees to remind the applicant that although a state consistency determination has been issued for the nationwide permit, there may be other state or local authorizations necessary before work can begin. For nationwide permits denied without prejudice, the Corps agrees to remind the applicant to submit a CPQ to DGC in order to obtain the required consistency review.

VIII. Resolution of a Consistency Dispute

A. DGC Objection to Applicant's Consistency Certification

1. If DGC objects to an applicant's consistency certification, DGC agrees to notify the applicant and the Corps of the objection.
2. DGC agrees to explain how the project could become consistent with specific enforceable standards and policies of the ACMP and describe stipulations, if any, that would allow the project to proceed in a manner consistent with the program.
3. If DGC's objection is based on a lack of sufficient information, DGC agrees to notify the applicant of the information needed to make a final decision on the consistency certification. See Chapter Three § IV.A.1., supra, Startup for State Consistency Review and § IV.B.2, State Response.
4. If a disagreement between DGC and the applicant regarding the consistency certification continues, an attempt will be made to reach an agreement through informal discussions with the applicant and other state review parties. See also, Chapter Three § III C., supra, Granting a Permit and § IV.B.2, State Response.
5. DGC agrees to notify the applicant of appeal rights under AS 46.40.100, 6 AAC 50.070(j)-(k), and 6 AAC 50.110(b)(7) at the time DGC objects to the applicant's consistency certification. See also, Chapter Three § IV.B.2, State Response.

B. Corps Response

1. Although the Corps may issue a provisional permit²⁷ to an applicant for an activity for which an applicant has not received the State of Alaska's final consistency concurrence, the Corps agrees not to issue final authorization for the proposed work until the state's consistency concurrence has been granted or presumed. If the state finds the project inconsistent with the ACMP, and notifies the Corps, the Corps agrees to deny the permit's authorization without prejudice.
2. Pursuant to 15 CFR § 930 (Subpart H), an activity which is inconsistent with the ACMP may be approved if the Secretary of Commerce finds the activity is consistent with the objectives or purposes of the CZMA or is necessary in the interest of national security.

²⁷

A provisional permit is a notification to an applicant that Corps requirements have been met and the Corps is ready to issue its authorization when the ACMP consistency review is completed. The provisional permit is not an authorization for work.

APPENDIX A

I. CZMA Statutory Language and Implementing Regulations

This list includes excerpts from the federal statute and regulations²⁸ applicable to federal activities and federally permitted activities.

A. Federal Activities

1. Coastal Zone Management Act § 307(c)(1) and (c)(2), regarding federal activities:

(c)(1)(A): Each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.

(c)(2): Any federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with the enforceable policies of approved State management programs.

2. Federal CZMA Implementing Regulations Regarding Federal Activities:

15 CFR § 930.31(a): The term “federal activity” means any functions performed by or on behalf of a federal agency in exercise of its statutory responsibility.

15 CFR § 930.31(b): A federal development project is a federal activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and the acquisition, utilization, or disposal of land or water resources.

15 CFR § 930.33(b): Federal agencies shall consider all development projects within the coastal zone to be activities directly affecting the coastal zone. All other types of activities within the coastal zone are subject to federal agency review to determine whether they directly affect the coastal zone.

15 CFR § 930.34(b): Federal agencies shall provide State agencies with a consistency determination at the earliest practicable time in the planning or reassessment of the activity. A consistency determination should be prepared following development of

²⁸ The federal regulations may conflict with the Coastal Zone Management Act because the CZMA was substantially amended when it was reauthorized in 1990. The regulations, however, have not been updated. Where the regulations conflict with the statute, they are superseded by the statute.

sufficient information to determine reasonably the consistency of the activity with the State's management program, but before the federal agency reaches a significant point of decision making in its review process. The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal activity unless both the federal agency and the State agency agree to an alternative notification schedule.

15 CFR § 930.41:

(a) A State agency shall inform the federal agency of its agreement or disagreement with the federal agency's consistency determination at the earliest practicable time. If a final response has not been developed and issued within 45 days from receipt of the federal agency notification, the State agency should at that time inform the federal agency of the status of the matter and the basis for further delay. The federal agency may presume State agency agreement if the State agency fails to provide a response within 45 days from receipt of the federal agency notification.

(b) State agency agreement shall not be presumed in cases where the State agency, with the 45 day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or less. In considering whether a longer or additional extension period is appropriate, the federal agency should consider the magnitude and complexity of the information contained in the consistency determination.

(c) Final federal agency action may not be taken sooner than 90 days from the issuance of the consistency determination to the State agency unless both the federal agency and the State agency agree to an alternative period. (see § 930.34(b)).

15 CFR § 930.42(b): If the State agency's disagreement is based upon a finding that the agency has failed to supply sufficient information (see § 930.39(a)), the State agency's response must describe the nature of the information requested and the necessity of having such information to determine the consistency of the federal activity with the management program.

B. Federally Permitted Activities

1. Coastal Zone Management Act § 307(c)(3)(A), Regarding Federally Permitted Activities

After final approval by the Secretary of a state's management program, any applicant for a required federal permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program

and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.

Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith.

At the earliest practicable time, the state or its designated agency shall notify the federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed.

No license or permit shall be granted by the federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

2. Federal CZMA Implementing Regulations Regarding Federally Permitted Activities

15 CFR § 930.58:

(a) The applicant shall furnish the State agency with necessary data and information along with the consistency certification. Such information and data shall include the following:

- (1) A detailed description of the proposed activity and its associated facilities which is adequate to permit an assessment of their probable coastal zone effects. Maps, diagrams, technical data and other relevant material must be submitted when a written description alone will not adequately describe the proposal (a copy of the federal application and all supporting material provided to the federal agency should also be submitted to the State agency).
- (2) Information required by the State agency pursuant to § 930.58(b).
- (3) A brief assessment relating the probable coastal zone effects of the proposal and its associated effects of the proposal and its associated facilities to the relevant elements of the management program.

(4) A brief set of findings, derived from the assessment, indicating that the proposed activity (e.g., project siting and construction), its associated facilities (e.g., access road, support buildings), and their effects (e.g., air, water, waste discharges, erosion, wetlands, beach access impacts) are all consistent with the provisions of the management program. In developing findings, the applicant shall give appropriate weight to the various types of provisions within the management program. While applicants must be consistent with the enforceable, mandatory policies of the management program, they need only demonstrate adequate consideration of policies which are in the nature of recommendations. Applicants need not make findings with respect to coastal zone effects for which the management program does not contain mandatory or recommended policies.

(b) At the request of the applicant, interested parties who have access to information and data required by subparagraphs (a) (1) and (2) of this section may provide the State agency with all or part of the material required. Furthermore, upon request by the applicant, the State agency shall provide assistance for developing the assessment and findings required by (a)(3) and (4) of this section.

(c) When satisfied that adequate protection against public disclosure exists, applicants should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposal. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal zone effects of the proposal.

15 CFR § 930.60:

(a) Except as provided in § 930.54(e), State agency review of an applicant's consistency certification begins at the time the State agency receives a copy of the consistency certification, and the information and data required pursuant to § 930.58.

(b) A State agency request for information or data in addition to that required by § 930.58 shall not extend the date of commencement of State agency review.

II. Corps of Engineers Regulations

A. 33 CFR § 330.4(d): Coastal zone management consistency determination.

(1) Section 307(c)(1) of the Coastal Zone Management Act (CZMA) requires the Corps to provide a consistency determination and receive state agreement prior to the issuance, reissuance, or expansion of activities authorized by an NWP that authorizes activities within a state with a federally-approved Coastal Management Program when activities that would occur within, or outside, that state's coastal zone will affect land or water uses or natural resources of the state's coastal zone.

(2) If, prior to the issuance, reissuance, or expansion of activities authorized by an NWP, a state indicates that additional conditions are necessary for the state to agree with the Corps consistency determination, the division engineer will make such conditions regional conditions for the NWP in that state, unless he determines that the conditions do not comply with the provisions of 33 CFR 325.4 or believes for some other specific reason it would be inappropriate to include the conditions. In this case, the state's failure to agree with the Corps consistency determination without the conditions will be considered to be a disagreement with the Corps consistency determination.

(3) When a state has disagreed with the Corps consistency determination, authorization for all such activities occurring within or outside the state's coastal zone that affect land or water uses or natural resources of the state's coastal zone is denied without prejudice until the prospective permittee furnishes the DE an individual consistency certification pursuant to section 307(c)(3) of the CZMA and demonstrates that the state has concurred in it (either on an individual or generic basis), or that concurrence should be presumed (see paragraph (d)(6) of this section).

(6) In instances where a state has disagreed with the Corps consistency determination for activities under a particular NWP, permittees must furnish the DE with an individual consistency concurrence or a copy of the consistency certification provided to the state for concurrence. If a state fails to act on a permittee's consistency certification within six months after receipt by the state, concurrence will be presumed. Upon receipt of an individual consistency concurrence or upon presumed consistency, the proposed work is authorized if it complies with all terms and conditions of the NWP. For NWPs requiring a 30-day predischARGE notification the DE will immediately begin, and may complete, his review prior to the state action on the individual consistency certification. If a state indicates that individual conditions are necessary for consistency with the state's federally-approved coastal management program for that individual activity, the DE will include those conditions as activity-specific conditions of the NWP unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case the DE will consider the conditioned concurrence as a nonconcurrence unless the permittee chooses to comply voluntarily with all the conditions in the conditioned concurrence.

(8) Federal activities must be consistent with a state's federally-approved coastal management program to the maximum extent practicable. Federal agencies should follow their own procedures and the Department of Commerce regulations appearing at 15 CFR part 930 to meet the requirements of the CZMA. Therefore, the provisions of 33 CFR 330.4(d)(1)-(7) do not apply to federal activities. Indian tribes doing work on Indian Reservation lands shall be treated in the same manner as Federal applicants.

- B. 33 CFR § 325.2(b)(2):** If the proposed activity is to be undertaken in a State operating under a coastal zone management program approved by the Secretary of Commerce pursuant to the Coastal Zone Management Act (see 33 CFR 320.3(b)), the district engineer shall proceed as follows.
- (ii) If the applicant is not a federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved State Coastal Zone Management Program. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the Coastal Zone Management Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers will seek agreements with state CZM agencies that the agencies failure to provide comment during the public notice comment period will be considered a concurrence with the certification or waiver of the right to concur or non-concur.
- C. 33 CFR § 325.2(e)(1): Letters of Permission.** Letters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation, but without the publishing of an individual public notice. The letter of permission will not be used to authorize the transportation of dredged material for the purpose of dumping in ocean waters. Letters of permission may be used: (i) In those cases subject to section 10 of the Rivers and Harbors Act of 1899 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition. (ii) In those cases subject to section 404 of the Clean Water Act after: (A) The district engineer, through consultation with Federal and state fish and wildlife agencies, the Regional Administrator, Environmental Protection Agency, the state water quality certifying agency, and, if appropriate, the state Coastal Zone Management Agency, develops a list of categories of activities proposed for authorization under LOP procedures; (B) The district engineer issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public

hearing; and (C) A 401 certification has been issued or waived and, if appropriate, CZM consistency concurrence obtained or presumed either on a generic or individual basis.

- D. **33 CFR § 325.2(e)(4): Emergency procedures.** Division engineers are authorized to approve special processing procedures in emergency situations. An "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. Even in an emergency situation, reasonable efforts will be made to receive comments from interested federal, state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable.

III. State Statutes and Regulations

This list includes, in part, the State of Alaska statutes and regulations applicable to the consistency review of federal activities and federally permitted activities.

A. ACMP Statutes

1. **AS 46.40.096(c):** The regulations adopted by the council under this section must include provisions for public notice and provide the opportunity for public comment. The regulations adopted under this subsection may make distinctions relating to notice based upon differences in project type, anticipated effect of the project on coastal resources and uses, other state or federal notice requirements, and time constraints. However, a notice given under this subsection must contain sufficient information, expressed in commonly understood terms, to inform the public of the nature of the proposed project for which a consistency determination is sought, and must explain how the public may comment on the proposed project.
2. **AS 46.40.096(e):** Under regulations adopted by the council, the reviewing entity shall provide opportunity to file a petition under AS 46.40.100(b)(1) seeking a review by the council of the proposed consistency determination prepared under (d)(2) of this section. The regulations must include provisions that establish a reasonable limit on the time that may elapse between the completion of the proposed consistency determination

prepared under (d)(2) of this section and a hearing to consider a petition filed under this subsection. Not more than 30 days shall elapse between the filing of the petition and the decision by the council. Under this subsection,

(1) the right to file a petition is limited to

(A) each of the following parties, but only if the party had submitted comments during the period for receipt of public comments established under (c) of this section:

(I) an affected coastal resource district;

(ii) a state agency; or

(iii) a citizen of an affected coastal resource district; or

(B) the project applicant . . .

3. **AS 46.40.096(g):** In this section,

(1) "affected coastal resource district" means a coastal resource district in which a project is proposed to be located or which may experience a direct and significant impact from a proposed project;

(2) "reviewing entity" means the

(A) office, for a consistency review subject to AS 44.19.145(a)(11);

(B) state agency identified in (b) of this section, for a consistency review not subject to AS 44.19.145(a)(11).

4. **AS 46.40.100(b)(1):** A party that is authorized under AS 46.40.096(e)(1) or (g) of this section may file a petition showing that a district coastal management program is not being implemented, enforced, or complied with. On receipt of a petition, the council, after giving public notice in the manner required by (f) of this section, shall convene a hearing to consider the matter. A hearing called under this subsection shall be held in accordance with regulations adopted by the council. After hearing,

(1) if the petition was filed under AS 46.096(e) and the council finds that

- (A) the office or the state agency responsible for coordinating the consistency review has not fairly considered the petitioner's comments in the development of a proposed consistency determination, the council shall remand the proposed consistency determination to the office or to the state agency responsible for coordinating the consistency review, for preparation of a revised proposed consistency determination that gives fair consideration to the petitioner's comments;
- (B) a remand of the consistency determination is not required under (A) of this paragraph, the council shall dismiss the petition;

B. ACMP Regulations

1. **6 AAC 50.050:** Expedited Review By Categorical Approval and General Concurrence Determinations.
 - (a) The consistency review of a project will be expedited as provided in (b) or (c) or this section if the project meets the requirements of one of those subsections.
 - (b) A project which requires one or more state or federal permits, each of which appears on the list published under (e) of this section listing permits which have been categorically approved by DGC as being consistent with the ACMP, is considered to have been conclusively determined by DGC to be consistent with the ACMP. A permit will be categorically approved if DGC determines that the activity authorized by the permit will have no significant impact in the coastal zone.
 - (c) A project which requires one or more state or federal permits not categorically approved as provided in (b) of this section will be considered consistent without further review, if it meets the requirements of a general concurrence determination contained on the list published under (e) of this section. A "general concurrence determination" is a consistency determination for a type of project which includes only routine activities, and which can be effectively made consistent with the ACMP by imposing standard stipulations on the applicable permit. If a subsequent project of any applicant fits the description in a general concurrence determination, the project will be considered consistent with the ACMP if it complies with the stated standard stipulations.

- (d) A project which requires one or more state or federal permits, and which is not within the categories described in (b) or (c) of this section, is subject to review as an individual project as provided in this chapter.
 - (e) DGC will publish a list of permits which have been categorically approved as being consistent with the ACMP, and a list of general concurrence determinations, and will identify on each list those permits or projects for which a coastal project questionnaire is not necessary. DGC will amend these lists as necessary on its own initiative, or on the request of a coastal resource district or a resource agency based on new information regarding the impacts of these activities, including cumulative impacts. Before publishing or amending these lists, DGC will distribute the proposed lists or amendments for comment in the manner provided in 6 AAC 50.070 for a project consistency review.
2. **6 AAC 50.070(j):** If a resource agency, an affected coastal resource district with an approved program, or the applicant does not concur with the proposed consistency determination, it may request elevation of the review by submitting a written statement which describes its concerns and includes a proposed alternative consistency determination which would meet its concerns. That party shall distribute this statement so that all review participants, the applicant, other commenting parties, and DGC will receive a copy on or before Day 49, or Day 29 in a 30-day review period, or within five days after receiving notice of the proposed determination, whichever is later. This requirement may be satisfied by transmitting the substance by telephone or other telecommunication device and sending written confirmation to all parties by mail or courier on or before the deadline under this subsection.

IV. Definitions and Clarifications

Coastal Resource District: As defined in AS 46.40.210 (2). Includes unified municipalities, organized boroughs, home rule and first class cities, and second class cities all which have planning and zoning powers. In addition, coastal resource service areas (CRSA) established under AS 29.03.020 and AS 46.40.110-180.

Coastal District Enforceable Policies: Each approved district program must include the policies that will be applied to land and water uses and activities subject to the district program, and the process which will be used to determine whether specific land and water uses and activities will be allowed. These policies are enforceable, so as to insure implementation of and adherence to the district program. All policies or enforceable rules of the district program must be clearly identified and located in a single section of the program document. The identified

policies or enforceable rules will provide the basis for all determinations of consistency with the approved district program. 6 AAC 85.090.

Emergency: A situation which would result in an unacceptable hazard to life, a significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. 33 CFR § 325.2(e)(4). Where an emergency necessitates an expedited agency review, the head of DGC may modify the review process as necessary to meet the emergency and as authorized in 6 AAC 50. Any modifications must be made in writing by the head of DGC, based upon clear and convincing evidence of a need for the modification. 6 AAC 50.090.

Federal Activity: Any functions performed by or on behalf of a federal agency in the exercise of its statutory responsibilities. 15 CFR § 930.31(a). The term does not include the issuance of a federal license or permit to a non-federal applicant or the granting of federal assistance to an applicant agency. 15 CFR § 930.31(c).

Federal Consistency Determination: A brief statement of whether the proposed activity will comply with the management program "to the maximum extent practicable." The consistency determination should include a description of the project, associated facilities and effects, and any other necessary supplemental information such as design drawings or copies of permit application. 15 CFR § 930.39(a).

Federal Development Project: A federal activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and the acquisition, utilization, or disposal of land or water resources. Federal agencies shall consider all development projects within the coastal zone to be activities affecting the coastal zone. 15 CFR § 930.31(b).

Federal License or Permit: Issuance of a federal license or permit to an applicant or permit or the granting of federal assistance to an applicant agency does not constitute a federal Activity. 15 CFR § 930.31(c). The term also includes permit renewals and modifications. 15 CFR § 930.51.

Negative Determination: The negative determination procedures apply where the Corps decides that its activity will not affect the coastal zone. 15 CFR §§ 930.35(d) and 930.36.

State Permit Consistency Determination: DGC coordinates the review of projects which require the permits of two or more state agencies or a federal permit. 6 AAC 50.030.

APPENDIX B

Attached are:

- 1) a copy of H.R. REP. NO. 964, 101st Cong., 2nd Sess. (1990), reauthorizing the Coastal Zone Management Act, and
- 2) a copy of the Letter of Agreement (LOA) of June 25, 1990, between the Corps and DGC regarding Quarry Site Evaluation

H.R. REP. NO. 964

Letter of Agreement
Quarry Site Evaluation